

OPEN MEETING AGENDA ITEM



0000089346

ORIGINAL

**Brooke Utilities, Inc.**

P. O. Box 82218 • Bakersfield, California 93380-2218  
Customer Service Center • (800) 270-6084

2008 OCT 10 P 3:32

AZ CORP COMMISSION  
DOCKET CONTROL

ROBERT T. HARDCASTLE  
Fax (781) 823-3070  
RTHH@brookcutilities.com

October 10, 2008

**Via E-Mail and Certified U.S. Mail**

William F. Haney, Chairman  
Pine Strawberry Water Improvement District  
P.O. Box 134  
Pine, Arizona 85544-0134

Michael Greer, Designated Representative  
Pine Strawberry Water Improvement District  
P.O. Box 134  
Pine, Arizona 85544-0134

Richard Dickinson, Designated Representative  
Pine Strawberry Water Improvement District  
P.O. Box 134  
Pine, Arizona 85544-0134

Arizona Corporation Commission  
DOCKETED

OCT 10 2008



Re: **Joint Well Development Agreement ("JWDA") between Pine Water Company and Pine-Strawberry Water Improvement District (the "District") dated May 1, 2007; ACC Docket No. W-03512A-07-0362**

Dear Mr. Haney:

By this letter, Pine Water Company ("PWCo") hereby notifies the District that (i) PWCo has exercised its right to extend the project schedule and timeline under ¶ 3.3 of the JWDA as a result of Project delays; and (ii) PWCo intends to proceed with execution of a drilling contract for the K2 well, requesting disbursement of the escrow funds and completion of the K2 Project under the JWDA.

PWCo intended to discuss these issues with the District's Designated Representatives at a meeting scheduled for October 8, 2008. Under ¶ 8 of the JWDA, PWCO is responsible for scheduling communications and meetings with each party's Designated Representative "regarding the status of the Project." Specifically, PWCo is authorized to schedule such meetings "as needed" upon five (5) days notice. On October 3, 2008, PWCo notified Mr. Greer and Mr. Dickinson that a meeting of the Designated Representatives was scheduled for Wednesday October 8, 2008. Unfortunately, both Mr. Dickinson and Mr. Greer refused to attend such meeting and failed to provide any alternative dates at that time. During the evening of October 8,

Brooke Water L.L.C., Circle City Water Co. L.L.C., Strawberry Water Co., Inc., Pine Water Co., Inc., Payson Water Co., Inc., Navajo Water Co., Inc., Tonto Basin Water Co., Inc.

William F. Haney  
Pine-Strawberry Water Improvement District  
October 10, 2008  
Page 2

Mr. Dickinson left a voice mail message with PWCo's Designated Representative indicating their availability for such a meeting during next week. Because the District's Designated Representatives could not attend a meeting this week, PWCo is sending this letter as the necessary communication between the parties relating to the K2 Project.

The purpose of this letter is to outline the steps for completion of the K2 Project under the JWDA and attempt to avoid any legal disputes. In order to develop potential water sources in the Pine area for the coming year, it is imperative that PWCo and the District immediately proceed with completion of the K2 Project under the JWDA. Any further delays may harm the Pine community. Because of the public interest in this Project, PWCo is filing copies of this letter with Arizona Corporation Commission ("ACC") Docket Control in order to keep the Commissioners and ACC Staff updated on the status of the Project.

#### **I. THE DISTRICT'S FAILURE TO COOPERATE ON THE K2 PROJECT.**

Unfortunately, the District has failed to comply with its duties and obligations to cooperate in completing the K2 Project under the JWDA, including, but not limited to, ¶ 3.1 ("PSWID shall have the right to participate in all planning, decisions and proceedings relating to the K2 Well Project, and shall be provided copies of planning documents as necessary to participate in a commercially reasonable manner, *including, reasonably cooperating in obtaining necessary government approvals.*") (emphasis added); ¶ 10.1 ("The Parties agree to cooperate at all times in good faith to achieve their goal of developing a permanent well at the K2 site...."); ¶ 10.2 ("PSWID covenants and agrees to support any effort by PWCo to obtain approval of this Agreement by the ACC...Such support shall, upon reasonable request by PWCo, include PSWID providing public comment supporting this Project and the inclusion of the fair and reasonable cost thereof in rate base in proceedings before the ACC.").

For example, the comments, actions and statements by a Board Member of the District at the September 23, 2008 Open Meeting before the ACC are contrary to those provisions of the JWDA. *See, e.g.*, Comments of District Secretary Richard Dickinson, 9/23/08 Tr., p. 5 ("I'm asking you to postpone a decision on the encumbrance of Pine Water Company until a decision has been rendered regarding the constitutionality of the joint well development agreement.").

Further, Intervenor Mr. Greer (despite his status as one of the District's Designated Representatives) and Mr. Krafczyk have argued that the JWDA is unconstitutional and that the District did not have legal authority to execute such agreement. In making those arguments, Intervenor is represented by Mr. Gliege, who also is acting as legal counsel to the District. To the extent a court issues an order or finding that the JWDA is unconstitutional or that the District did not have proper legal authority to enter the JWDA, such finding would result in the District being liable to PWCo for misrepresentation and breach of warranty under ¶ 7.1 of the JWDA. Specifically, the District would be liable for misrepresenting and warranting to PWCo that "[t]he PSWID Board (i) has duly authorized and approved the execution and delivery of, and

performance of its obligations under this Agreement; and (ii) have duly authorized and approved the consummation of all other transactions contemplated by this Agreement.” JWDA at ¶ 7.1.3. Additionally, the District would be liable for misrepresenting and warranting to PWCo that “[t]he consummation of the transactions contemplated in this Agreement will not conflict with or constitute a breach of or default under any provision of applicable law or administrative regulation of the State of Arizona...” JWDA at ¶ 7.1.4. One also can’t help but notice the apparent conflict of Mr. Gliege and Mr. Greer in advocating arguments on behalf of the Intervenor that, if successful, will make the District liable to PWCo for damages.

Under the express terms of the JWDA, the District has a duty to cooperate in completing the K2 Project and seeking ACC approval of the pending encumbrance application. Contrary to that duty, District representatives voiced opposition to ACC approval at the September 23 Open Meeting. Acting as counsel for the District, Mr. Gliege made various statements relating to the District’s efforts to condemn PWCo and urged the Commissioners to postpone approval of the pending ACC application to allow the District to proceed with condemnation proceedings. The clear import of Mr. Gliege’s comments was that the District does not intend to comply with the JWDA. Instead, the District intends to condemn PWCo. Such actions and statements by the District are contrary to the JWDA. *See* Comments by J. Gliege, 9/23/08 Tr., pp. 127-130.

In response to questions from the Commissioners, Mr. Gliege supported the District’s request to delay approval of the ACC application by stating that “the district has received an offer from the -- I believe it’s Municipal Finance Leasing Corporation out of Kansas to provide the money needed not only for the ultimate acquisition, but also to provide the necessary money for a bond for immediate possession.” Comments by J. Gliege, 9/23/08 Tr., p. 126.

Unfortunately, Mr. Gliege’s statements are not supported by certain documents provided by the District in response to PWCo’s public records request. On August 8, 2008, PWCo issued a public records request to the District asking for “[a]ny and all information and documentation relating to the District’s financial plan and funding sources for the purchase” of PWCo. In an August 25, 2008 letter, Mr. Greer (acting on behalf of the District) provided PWCo with one document relating to funding for such acquisition—an August 21, 2008 letter from the Municipal Leasing Credit Corporation (“MLCC”) (attached as exhibit A to this letter). Mr. Greer also certified that the District did not withhold any public documents.

The actual statements in that letter from MLCC appear to differ from Mr. Gliege’s representations to the Commissioners that MLCC has agreed to provide financing for the acquisition. A careful review of the MLCC letter illustrates that point:

- “The potential of a hostile takeover and ensuing court battle eliminates most typical investors in this type of project. The uncertainty of future status is just too great a risk for them, especially in light of the recent downturn in the credit markets. Credit requirements are much tighter than

before, and any slight variance from the norm causes good projects to be rejected." 8/21/2008 MLCC letter, p. 1.

- "Many brokerage houses will consider this deal too small, especially when it may face litigation." 8/21/2008 MLCC letter, p. 1.
- "Banks (with the FDIC looking over their shoulder) will need audited financials for transactions this large and are very unlikely to approve a transaction heading to court. Grants, if available, take too long to obtain to be of immediate help to you. WIFA finances larger cities and towns with audited financials and no court case in their future. "8/21/2008 MLCC letter, p. 1.
- "Indeed, the pool of money to accomplish your project – in the way you need it done – is extremely small." 8/21/2008 MLCC letter, p. 1.

Rather than offering to provide actual financing to the District for acquisition of PWCo, MLCC appears to have offered to seek "tax-exempt municipal leasing" as the "best opportunity to obtain the funds you need in the manner you need them." 8/21/2008 letter from MLCC, p. 1. MLCC proposed a resolution to be executed by the District Board, approving the hiring of MLCC "to arrange, within 90 days from the date this resolution is adopted, financing for the acquisition of the Water System and any other assets required to operate the Water Systems and all incidental costs thereto." See MLCC Proposed Resolution, p. 1. That resolution clarifies the contingent nature of MLCC's offer: "Completion of the financing is contingent upon credit approval and the negotiation of mutually acceptable financing documents." *Id.*

Given the possibility that Mr. Gliege's statements at the September 23 Open Meeting were based on some new documents not previously disclosed, PWCo issued a follow-up public records request to the District on September 25, 2008, requesting any and all public records relating to the District's financing and proposed acquisition of PWCo received by the District after the District's August 25, 2008 public records response to PWCo. As of today, the District has not provided any additional documents to PWCo.

Without a written commitment from a reputable lending source that guarantees funding for the proposed acquisition, it is apparent that the District does not have any firm financing and that the District is using the specter of condemnation as a means to delay and frustrate the K2 Project. If the District has a firm written commitment for financing, the District inexplicably has not provided it to PWCo. Thus, it appears that the skepticism counsel for PWCo expressed to the ACC Commissioners at the Open Meeting about the District's prospects for funding the acquisition is well-founded.

As of today, the K2 Project can be completed in accordance with the JWDA as long as the District abides by its contractual and legal obligations set forth in the JWDA. Under these circumstances, PWCo specifically advises the District to refrain from any further actions or delay tactics designed to prevent completion of the K2 Project. In the event the District and/or its

representatives continue such tactics, and such actions by the District prevent completion of the K2 Project under the JWDA and/or result in damages to PWCO, PWCo will be forced to pursue arbitration proceedings against the District (under ¶ 13 of the JWDA) to recover monetary damages, obtain specific performance and/or seek any other necessary relief.

## **II. TIME EXTENSION UNDER THE JWDA.**

PWCo stands willing, ready and able to perform its obligations under the JWDA. PWCo intends to continue the K2 Project because PWCo believes that the Project serves the best interest of the community. In an effort to complete the K2 Project under the JWDA, PWCo hereby exercises its right to extend the project schedule and timeline under ¶ 3.3 of the JWDA, which provides:

Subject to Section 3.2, PWCo shall exercise commercially reasonable efforts to construct and complete or cause to be completed, the Project in accordance with the timeline set forth in Attachment 3. The deadlines set forth in Attachment 3 **shall be extended** for any period of time that progress or design, processing or construction of the Project is reasonably delayed, despite PWCo's reasonable efforts, due to unexpected delays in scheduling well drilling, unexpected delays in obtaining equipment and supplies necessary for the Project or unnecessary delays caused by material obstacles encountered during the actual drilling of the K2 Well Project. **The timeline shall also be extended for any period of time the Project is reasonably delayed due to inclement weather or other natural disaster, unavailability or shortage of labor or materials, national emergency, fire or other casualty, natural disaster, war, unforeseen delays or actions of governmental authorities or utilities, riots, acts of violence, labor strike, injunctions in connection with litigation, or the failure of PSWID to timely pay or deposit any amount required hereunder, or any other matters outside of the reasonable control of PWCo that renders performance within the timeline commercially impracticable.**

JWDA at ¶ 3.3 (emphasis added). Any delays in completion of the K2 Well Project beyond the completion date set forth in the JWDA are the result of various delays beyond PWCo's control, including the delay tactics and actions by the District. Under ¶ 3.3 of the JWDA, the project schedule is hereby extended for the period of time resulting from all such delays as necessary in the event that the K2 Project cannot be completed within the schedule set forth in the JWDA.

## **III. NOTICE OF INTENT TO PROCEED WITH WELL CONSTRUCTION.**

Finally, this letter serves as notice to the District that PWCo intends to execute a well drilling agreement with the successful bidder to drill the K2 Well. PWCo has received four competitive bids and bonds for the drilling contract. In turn, PWCo intends to accept the best and

William F. Haney  
Pine-Strawberry Water Improvement District  
October 10, 2008  
Page 6

most qualified bid. PWCo then plans to execute a contract with the well driller with an approximate start date for the work of January 2009.

Under the JWDA, PWCo "shall furnish to PSWID copies of all third party contracts or any other contracts proposed to be entered into by PWCo for construction of the Project and/or the supplying of materials in connection therewith at least 5 business days before executing them." JWDA, ¶ 3.2. PWCo will provide the District with a copy of the drilling contract and, after expiration of such five day period, PWCo intends to execute the drilling contract with the successful bidder and begin drilling operations. PWCo anticipates providing the drilling contract and related documents to the District in the near future.

PWCo then will make a draw request from the escrow funds for the remaining amount in the escrow account to pay for the anticipated \$250,000-300,000 drilling deposit under the proposed drilling contract. Under ¶ 4.2.1.4 of the JWDA, PWCo is entitled "to make draws from the Escrow to fund contracts entered into in accordance with this Agreement by presenting a written statement representing and warranting that the amount is due and owing under such contract or contracts, specifying the work covered by the draw and the contract associated therewith." If the District or its Designated Representative prevents or refuses to authorize disbursement of the escrow funds for the drilling contract, the District will materially breach the JWDA, entitling PWCo to monetary damages and/or specific performance.

In accordance with the JWDA, PWCo will continue to seek ACC approval of the encumbrance application. It must be stated, however, that under the JWDA and the February 8, 2008 Escrow Instructions, an ACC order approving the pending encumbrance application is **not** a necessary pre-condition for drilling of the K2 Well or use of the escrow funds. The District originally insisted on ACC approval of the District's lien rights against the K2 Well site before depositing the \$300,000 in escrow. In ¶ 4.2.1.1(a) of the JWDA, the parties agreed that ACC approval of the financial encumbrance in favor of the District was a precondition to the District's obligation to place the \$300,000 in escrow. It is important to clarify that the ACC application was filed out of an abundance of caution at the District's request to obtain approval for a lien in favor of PSWID against the well site pursuant to A.R.S. § 40-285 (A); and for issuance of indebtedness in favor of PSWID pursuant to A.R.S. § 40-302(A).

In the Escrow Instructions dated February 8, 2008, the District expressly waived those conditions on its funding obligations and agreed to place the \$300,000 in escrow with or without a valid lien interest against the K2 Well site. Escrow Instructions, ¶ 1(a) ("PSWID....having waived receipt of ACC approvals and recordation of the Notice of Continuing Security Interest and Lien as a precondition of depositing PSWID Funds with Escrow Agent shall, within ten (10) days of its receipt of an executed original of these Instructions, deposit the PSWID funds (\$300,000.00) with Escrow Agent."). The District agreed that its lien interests were "expressly subject to any adverse final non-appealable decision of the Arizona Corporation Commission or

William F. Haney  
Pine-Strawberry Water Improvement District  
October 10, 2008  
Page 7

court of law that the Continuing Security Interest and Lien is void and unenforceable." Escrow Instructions at ¶ 1(a)(iii).

Thus, the ACC's decision relating to the pending application is not necessary in order to proceed with Project construction and use of the escrow funds under the JWDA. For that reason, and because of the need to develop potential water sources in the Pine area for 2009, PWCo has decided to proceed with the necessary drilling operations for the K2 Project.

#### **IV. CLOSING REMARKS.**

Since March 2008, the District's actions and conduct have been disappointing and in flagrant disregard of the District's responsibilities under the JWDA. Even so, PWCo remains committed to completion of the K2 Project in the best interests of the community. PWCo hopes that the District will take advantage of this last opportunity to honor its contractual commitment to develop and fund the K2 Project.)

Sincerely,



Robert T. Hardcastle, President

cc: ACC Docket Control (14 copies), Docket No. W-03512A-07-0362  
Dwight D. Nodes, Administrative Law Judge  
Jay Shapiro, Esq.  
David Allred, PWCo Designated Representative  
Myndi Brogdon, PWCo Designated Representative  
Kevin Torrey, Esq.  
John J. Gliege, Esq.

August 21, 2008

Mr. William F. Haney, P.E.  
Pine Strawberry Water Improvement District  
P.O. Box 134  
Pine, AZ 85544



11184 Antioch, Ste. 313  
Overland Park, KS  
86210-2420

Ph. 913.381.1900  
Fax 913.381.0105

Re: Financing the acquisition of the Pine Water Company  
and the Strawberry Water Company

info@mlccfinance.com

Dear Mr. Haney:

I appreciate the opportunity to participate in the potential financing of the acquisition of two water companies in the Pine, Arizona area. I have reviewed the project, analyzed the financial information provided, and had several discussions with our bond counsel concerning the legal issues associated with financing this project.

The potential of a hostile takeover and ensuing court battle eliminates most typical investors in this type of project. The uncertainty of future status is just too great a risk for them, especially in light of the recent downturn in the credit markets. Credit requirements are much tighter than before, and any slight variance from the norm causes good projects to be rejected.

Many brokerage houses will consider this deal too small, especially when it may face litigation. In addition, their bond issues need voter approval; there is usually an additional 1 - 2 % in fees just to cover their sales staff, and they will need an Official Statement in order to offer the bonds to the public. (An OS is costly, time-consuming, and involves scrutiny of every minor detail in this transaction). Banks (with the FDIC looking over their shoulder) will need audited financials for transactions this large and are very unlikely to approve a transaction heading to court. Grants, if available, take too long to obtain to be of immediate help to you. WIFA finances larger cities and towns with audited financials and no court case in their future. Indeed, the pool of money to accomplish your project - in the way you need it done - is extremely small.

Tax-exempt municipal leasing offers you, by far, the best opportunity to obtain the funds you need in the manner you need them. Advantages of leasing are many:

1. No voter approval is needed.
2. No assessment lien bonds are needed.
3. The financing can be completed in a short amount of time.
4. Documentation is simple - no offering statement is needed.
5. Rules are relaxed on some requirements because the FDIC, SEC, or other governmental agencies do not regulate leasing companies. A leasing company can assess a project and determine on its own how much risk it is willing to take.



6. The flexibility of structuring payments is almost endless. Payments are planned with the borrower's cash flow in mind.
7. Resolution by the governing board of PSWID is the only approval needed from the borrower.
8. The District has the option of adding to the lease if a larger dollar amount is needed.
9. The lease can be prepaid in full. Once the lawsuit is settled and the District's financial uncertainty resolved, the District will have the option to "shop" for a different payment plan if desired.
10. The lease has a \$1.00 final payment at the end – no extra charges, no fair market value, no residual costs, etc.



11184 Antioch, Ste. 313  
Overland Park, KS  
66210-2420

Ph. 913.381.1900  
Fax 913.381.0105

[info@mlccfinance.com](mailto:info@mlccfinance.com)

As you can see, lease purchase financing can fully satisfy the requirements of your unusual situation. Since you will need funds within the next month or two, we have attached a Board Resolution authorizing MLCC to move forward with this financing. To allow us the time necessary to prepare the documents and complete credit approval, please have this Resolution passed as soon as possible and return to us via fax (913.381.0105) or email, [carol@mlccfinance.com](mailto:carol@mlccfinance.com).

I appreciate the difficult situation of the PSWID right now, although your efforts will more than pay off for your community. Municipal Leasing Credit Corporation hopes to be a part of helping you solve your community's water needs. Please call 800-333-4910 or email [carol@mlccfinance.com](mailto:carol@mlccfinance.com) if I can be of help. I look forward to hearing from you soon.

Sincerely,

Carol D. Searcy

CDS:ebo

Encls.

RESOLUTION NO. \_\_\_\_\_

RESOLUTION OF THE BOARD OF DIRECTORS OF THE PINE-STRAWBERRY WATER  
IMPROVEMENT DISTRICT ENGAGING THE SERVICES OF MUNICIPAL LEASING  
CREDIT CORPORATION

WHEREAS, the PINE-STRAWBERRY WATER IMPROVEMENT DISTRICT ("PSWID"), is interested in obtaining financing for the acquisition of the Pine Water Company, Strawberry Water Company and assets of Brooke Utilities and any other entities necessary to operate a complete water system (the "Water System") serving the properties within the PSWID; and

WHEREAS, PSWID recognizes that due to the nature of the transactions necessary to acquire the Water System it is essential that it have immediate access to the funding necessary to complete the acquisition of the Water System; and

WHEREAS, due to the ongoing problems concerning water supply and cost to the community and the fact that water which is available to the community is not available to the existing private water company serving the community it is necessary that the community, through the PSWID, become the owner of the Water System in order to protect the public health, safety and welfare of the community.

THEREFORE, BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE PINE-STRAWBERRY WATER IMPROVEMENT DISTRICT THAT:

BE IT RESOLVED that the Board of Directors of PSWID (the "Board") hereby approves the hiring of Municipal Leasing Credit Corporation, 11184 Antioch, Suite 313, Overland Park, KS 66210-2420 ("MLCC") to arrange, within 90 days from the date this resolution is adopted, financing for the acquisition of the Water System and any other assets required to operate the Water Systems and all incidental costs thereto. Completion of the financing is contingent upon credit approval and the negotiation of mutually acceptable financing documents.

BE IT FURTHER RESOLVED that the Board hereby authorizes MLCC to take any and all actions which MLCC deems necessary or appropriate to continue the credit review process and arrangement of the financing; and in that connection, to employ and retain Ballard Spahr Andrews & Ingersoll, LLP, as legal counsel, and to perform any and all acts and deeds which MLCC deems necessary, proper, and desirable, with a view to the successful closing of the financing.

BE IT FURTHER RESOLVED that the Board acknowledges that, in accordance with the above resolution, MLCC will incur some preliminary expenses for the benefit of the PSWID in the course of MLCC's arrangement of the financing, including legal fees, photocopies, long-

distance tolls, facsimile transmissions, postage, and, to the extent reasonably required and authorized by the Board, costs of out-of-state travel.

BE IT FURTHER RESOLVED that in the event the financing is not successfully completed, the Board hereby agrees to reimburse MLCC, upon the proper presentation of invoices, for MLCC's out-of-pocket costs in an amount not to exceed \$5,000 and for the legal fees of Ballard Spahr Andrews & Ingersoll, LLP in an amount not to exceed \$7,500.

BE IT FURTHER RESOLVED that each member of the Board is authorized to execute and attest, as the case may be, any documents, and to take any and all such other and further actions which the Borrower or the Borrower's legal counsel, Gliege Law Offices PLLC, may deem necessary or appropriate to complete the financing:

BE IT FURTHER RESOLVED that to the extent that any of the actions authorized by any of the foregoing resolutions have been taken by the members of the Board, PSWID's agents or employees, on its behalf, such actions are hereby ratified and confirmed in their entirety.

Adopted this \_\_\_\_\_ day of \_\_\_\_\_, 2008

PINE-STRAWBERRY WATER  
IMPROVEMENT DISTRICT

By: \_\_\_\_\_  
William F. Haney, Chairman

Attest

By: \_\_\_\_\_  
Richard Dickinson, Secretary

Approved as of this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ by the Board of Directors  
of the Pine-Strawberry Water Improvement District, with a vote of \_\_\_\_\_ Yays and  
\_\_\_\_\_ Nays.

By: \_\_\_\_\_  
Richard Dickinson, Secretary